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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

SOUTHWEST MARINE, INC.,
PETITIONER,

v.

SAN DIEGO BAYKEEPER, THE NATURAL RESOURCES DEFENSE COUNCIL AND KENNETH J. MOSER,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a Clean Water Act citizen suit notice letter that does not identify the activity alleged to violate the defendant's NPDES permits satisfies the jurisdictional prerequisites to suit established by 33 U.S.C. § 1365(b)(1)(A)?

2. Whether the Clean Water Act prohibits a federal court from imposing more stringent requirements on industrial operations by injunction and other remedies than those imposed by permits that were lawfully issued by the environmental agency responsible for implementing the Act?

PARTIES TO THE PROCEEDING

The petitioner is Southwest Marine, Inc. The respondents are the Natural Resources Defense Council, San Diego BayKeeper and Kenneth J. Moser.

CORPORATE DISCLOSURE

Southwest Marine, Inc. is a California corporation. Southwest Marine, Inc. is a wholly-owned subsidiary of United States Marine Repair, Inc., a privately held company. No publicly held company owns ten percent or more of Southwest Marine, Inc.'s stock.

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Southwest Marine, Inc. ("Southwest Marine") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 236 F.3d 985. The order of the district court lifting the stay of the injunction against Southwest Marine (*id.* at 36a-39a) is unreported. The order of the district court entering a limited stay of several provisions of the injunction against Southwest Marine (*id.* at 40a-44a) is unreported. The judgment of the district court ordering injunctive relief, a civil penalty and attorneys' fees against Southwest Marine (*id.* at 45a-46a) is unreported. The findings of fact and conclusions of law of the district court (*id.* at 47a-63a) is unreported. The order of the district court first awarding injunctive relief and a civil penalty against Southwest Marine (*id.* at 64a-76a) is unreported. The order of the district court denying Southwest Marine's motion for summary judgment (*id.* at 77a-98a) is unreported. The order of the district court denying Southwest Marine's motion to dismiss for lack of subject matter jurisdiction (*id.* at 99a-107a) is reported at 945 F. Supp. 1330.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

33 U.S.C. § 1365.

33 U.S.C. § 1319(d).

40 C.F.R. § 135.3.

(The full text of these provisions appears in Pet. App. 108a-113a.)

STATEMENT OF THE CASE

I. REGULATORY BACKGROUND

Congress enacted a series of amendments, now commonly known as the Clean Water Act ("CWA"), to the Federal Water Pollution Control and Prevention Act in 1972. 33 U.S.C. §§ 1251-1386. Section 301 of the Clean Water Act prohibits all discharges of pollutants into the nation's waters except as authorized by the Act. 33 U.S.C. § 1311(a). Congress then expressly delegated responsibility for determining what discharges to permit, and under what circumstances, to the Administrator of the Environmental Protection Agency ("EPA"). 33 U.S.C. § 1342(a). The process by which EPA issues such permits is called the National Pollutant Discharge Elimination System ("NPDES"). EPA may in turn delegate the authority to issue NPDES permits to an approved State agency or program that conforms to federal guidelines. 33 U.S.C. § 1342(b). The NPDES process initially governed only "point source" discharges, but was expanded in 1987 to cover pollutants carried into surface waters by storm water runoff as well. *See* 33 U.S.C. § 1342(p).

The holder of a federal or State NPDES permit is subject to enforcement actions by the Administrator of the EPA and any appropriate State officials for failure to comply with the terms of the permit. 33 U.S.C. §§ 1319, 1342(b)(7). The Act also has a "citizen suit" provision allowing private citizens to bring a civil action against any person "alleged to be in violation of" the terms of a federal or state NPDES permit. 33 U.S.C. § 1365(a)(1).

Before initiating such an action, however, a potential citizen plaintiff must provide at least sixty days notice "of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation or order . . . ." 33 U.S.C. § 1365(b)(1)(A). EPA has established by regulation

that the notice letter must include "sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice." 40 C.F.R. § 135.3(a). This Court has held that citizen suit notice provisions like this one must be strictly construed and applied in order to protect Congress's decision to vest primary enforcement responsibility in the appropriate administrative agencies, and in order to give the recipient an opportunity to comply voluntarily with the law. *See, e.g., Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989) (interpreting identical provision in the Resource Conservation and Recovery Act).

The State of California has developed an EPA-authorized NPDES permit program. *See* 39 Fed. Reg. 26061 (1974); California Water Code §§ 13160-13169 and 13200-13260. Point source discharges into California waters are governed by permits issued by nine Regional Water Quality Control Boards ("RWQCB") across the State. California Water Code § 13200. California elected to issue a single, statewide "General Industrial Permit" in 1991 for all industrial storm water discharges requiring a permit (except discharges relating to construction activity). Pet. App. 3a.

II. HISTORY OF THIS LITIGATION

Petitioner Southwest Marine is a shipyard operator in San Diego, California. It applied for and received an NPDES point source permit from the RWQCB in 1983, and storm water coverage under the General Industrial Permit in 1992. Pet. App. 2a-3a. California's General Industrial Permit also required petitioner to develop and implement a "Storm Water Pollution Prevention Plan" and "Storm Water

Monitoring and Reporting Plan." Pet. App. 4a. Petitioner submitted its storm water plan to the RWQCB in December, 1992. Pet. App. 5a. The General Industrial Permit governing storm water discharges in California was amended several times after 1991, and eventually was superseded in the area relevant to this litigation by specific storm water requirements adopted by the San Diego RWQCB in May 1997. Pet. App. 7a. Petitioner's operations are currently governed by a comprehensive permit designed specifically for shipyards and adopted by the San Diego RWQCB in October 1997. *See id; see also* Appellant's Excerpt of Record ("ER") 249-428.

On April 30, 1996, respondents San Diego BayKeeper and the Natural Resources Defense Council sent a letter to petitioner captioned "Notice of Intent to Sue for Violations of the Clean Water Act." Pet. App. 28a. That letter referenced both of petitioner's then-current permits, and stated that the "[permit] requirements with which we believe Southwest Marine . . . ha[s] failed to comply are set forth in [Attachments 1 and 2] of this letter." Pet. App. 29a. Those attachments, in turn, listed several specific provisions of petitioner's point source permit and the General Industrial Permit and recited (essentially verbatim) what those provisions prohibited or required. Pet. App. 33a; ER 118-20. One of the General Industrial Permit provisions listed in Attachment 2 required the "development and implementation" of a storm water plan "describing the storm water management controls appropriate for the facility (for example, storm water pollution prevention personnel, preventive maintenance, good housekeeping, spill prevention and response, storm water management practices, erosion and sediment controls, employee training, and inspections)." Pet. App. 33a. The letter and its attachments contained no factual information about what specific actions or activities of petitioner were alleged to violate the listed provisions.

Respondents filed this lawsuit on August 27, 1996. Pet. App. 6a. The district court generally had jurisdiction over the action pursuant to 28 U.S.C. § 1331, although (as explained below) it did not have jurisdiction to entertain particular allegations of Clean Water Act violations about which petitioner did not receive adequate notice.

Petitioners moved to dismiss the complaint for failure to comply with the Clean Water Act's citizen suit notice requirements. Citing *Hallstrom*, the district court acknowledged that adequate notice was a jurisdictional prerequisite to filing suit, and that the purpose of the notice letter was "(1) to allow the alleged violator time to come into compliance with the CWA, (2) to give the alleged violator an opportunity to negotiate a resolution to the dispute, and (3) to give state and federal environmental regulatory agencies an opportunity to enforce their laws and regulations." Pet. App. 102a-103a (citing *Hallstrom*, 493 U.S. at 29). The district court nonetheless held that the notice letter was sufficient because the court interpreted that letter as alleging only that petitioner had failed to develop and implement a storm water plan that was facially adequate under the terms of petitioner's permits. *Id.* at 104a. The court concluded, for example, that "[t]he defendant's failure to prepare and implement legally sufficient environmental compliance plans is the activity that constitutes the violation" and that "the letter adequately describes the location of the alleged violations because the violations are within the [plans] themselves." *Id.* at 104a-105a.

Believing that respondents' claims were therefore limited to the legal sufficiency of its storm water plans, petitioner moved for summary judgment. Pet. App. 77a-98a. Contradicting its earlier holding that the only alleged violations were "within the [plans] themselves," however, the district court held that there were disputed issues of material fact concerning both the facial sufficiency of

petitioner's storm water plans and whether petitioner was adequately *implementing* those plans. Pet. App. 87a- 98a.

The district court then conducted a month-long trial at which the respondents presented wide-ranging evidence about numerous perceived deficiencies in petitioner's efforts to prevent storm water pollution, and about the overall environmental condition of petitioner's property and the San Diego Bay in general. After trial, the district court held that the terms of petitioners' storm water plans were adequate, but that petitioner had violated its permits and the Clean Water Act by failing to implement those plans adequately.[1] The district court then imposed elaborate injunctive relief, ordering petitioner (among other things) to: (1) test storm water for pollutants before releasing them into the Bay, (2) sweep open areas after every shift, (3) conduct testing of the water column beneath each vessel on which blasting or painting operations are being conducted, (4) capture *all* storm water runoff from its piers and (5) replace its existing asphalt berms for capturing storm water runoff with concrete berms. Pet. App. 9a; 23a-24a. Petitioner's current storm water permit does not require any of these measures. The district court also imposed a civil penalty of $799,000, which it allowed petitioner to set off against the expenses of complying with the injunction. Pet. App. 26a.

On appeal, petitioner challenged both the sufficiency of the original notice letter and the propriety of the district court's injunction and penalty assessment. The Ninth

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[1] The district court found no violation of petitioner's point source permit. *See, e.g.*, Pet. App. 65a ("[T]his Court finds that Defendant's implementation/enforcement of its storm water prevention plans has been inadequate."); Pet. App. 62a ("The question presented at trial was whether the storm water coming from Defendant's leasehold facility had a causal connection to the environmental condition of that offshore habitat."); *see also* Pet. App. 47a-63a (listing the district court's findings of fact and conclusions of law).

Circuit affirmed. The court reasoned that respondents' notice letter was sufficient because it "alleges that defendant failed to implement an adequate [storm water plan], including a 'good housekeeping' provision," and that respondents' eventual allegations at trial could be captured by a broad understanding of the phrase "good housekeeping." Pet. App. 15a-16a. The Ninth Circuit also pointed to the fact that petitioner revised its plan and some of its operating procedures during the course of this litigation as evidence that it "obviously understood at least some of the alleged violations." Pet. App. 16a.

Considering the propriety of the district court's injunction, the Ninth Circuit acknowledged that "a district court's equitable powers under the CWA are limited to enforcing standards, limitations and orders that have been violated" and that a district court may not "exercise its general equitable authority to override the terms of a properly issued permit." Pet. App. 22a (citing 33 U.S.C. § 1365(a) and *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 320 (1981)). Nonetheless, the court concluded that the district court could impose more stringent requirements than petitioner's existing, duly authorized NPDES permits as long as those additional requirements were "reasonably calculated to 'remedy an established wrong'" and "consistent with, and complementary to, existing permit requirements." Pet. App. 22a –23a (citation omitted).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit decided two issues of national significance in a manner that conflicts with this Court's established precedents. If left uncorrected, these serious errors will transform the administration of the Clean Water Act in the Ninth Circuit, upsetting the delicate balance struck by Congress between public and private enforcement of that Act and permitting the federal courts to usurp the policymaking discretion that Congress specifically entrusted

to the Environmental Protection Agency and its delegated State agencies.

First, the Ninth Circuit adopted an interpretation of the Clean Water Act's citizen suit notice provisions that eliminates all meaningful judicial scrutiny of the adequacy of that notice. The Ninth Circuit's reasoning renders the notice requirement an empty formality, and cannot be reconciled with this Court's instructions in *Hallstrom* and *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), that the citizen suit notice requirements in federal environmental statutes serve important statutory purposes and must be strictly construed and applied.

Second, the Ninth Circuit held that a district court may impose different and more stringent requirements on a Clean Water Act defendant by injunction than are imposed by the defendant's existing NPDES permits, so long as the injunction's additional requirements are "consistent with" and "complementary to" the permit. That reasoning conflicts with this Court's clear and repeated holdings in *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304 (1981), and *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), that the Clean Water Act's elaborate regulatory scheme completely occupies the field – and that, therefore, "[f]ederal courts lack authority to impose more stringent effluent limitations under federal common law than those imposed by the agency charged by Congress with administering this comprehensive scheme." *City of Milwaukee*, 451 U.S. at 320.

Petitioner respectfully suggests that both of these holdings merit the exercise of this Court's certiorari jurisdiction.

I. THE NINTH CIRCUIT'S HOLDING THAT THE NOTICE LETTER PROVIDED IN THIS ACTION WAS SUFFICIENT CANNOT BE RECONCILED WITH THE CLEAN WATER ACT OR THIS COURT'S PRECEDENTS

A. The Clean Water Act's Citizen Suit Notice Provisions Serve Important Statutory Goals, And This Court Has Held That They Should Be Strictly Construed And Applied

Congress provided that the primary enforcement mechanism for the Clean Water Act would be the NPDES permitting process and enforcement actions brought by EPA and corresponding State agencies. *See* 33 U.S.C. §§ 1319, 1342(b)(7). In the absence of agency enforcement, the Act does permit citizen suits. 33 U.S.C. § 1365(a)(1). But the Act and its implementing regulations require that any prospective citizen suit plaintiff first provide specific notice of its allegations 60 days in advance to the defendant and to regulators. 33 U.S.C. § 1365(b)(1)(A); 40 C.F.R. § 135.3(a).

As this Court has recognized, the citizen suit notice provision in the Clean Water Act mirrors identical provisions in many federal environmental statutes, *Hallstrom*, 493 U.S. at 23 & n.1, and serves several important goals. "First, notice allows Government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits." *Id.* at 29. Without an effective notice requirement, the primary enforcement role that Congress intended to confer on EPA and its delegates would be compromised. *See Gwaltney*, 484 U.S. at 60 ("The bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action."). Agency enforcement is also more efficient because "an agency may be able to compel

compliance through administrative action, thus eliminating the need for any access to the courts." *Hallstrom*, 493 U.S. at 29.

Second, the notice requirement "gives the alleged violator 'an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit.'" *Id.* (quoting *Gwaltney*, 484 U.S. at 60). Consensual resolution of a potential citizen suit serves the twin statutory goals of ending or remedying the alleged environmental damage more quickly than could be achieved by litigation, and avoiding the burden that constant litigation would place on both NPDES permit holders and the courts.

In recognition of these important policies, this Court held in *Hallstrom* that citizen suit notice requirements should be strictly construed and applied. This Court even went so far as to dismiss an action that "consumed the time and energy of the District Court and the parties for nearly four years" because the plaintiff had not notified EPA and the State regulators until the action was already underway. *Id.* at 32.

B. The Clean Water Act Requires Specific Notice Of The Factual Circumstances Alleged To Constitute A Violation of An NPDES Permit

EPA is the administrative agency charged by Congress with enforcing the Clean Water Act, and its interpretations of that Act's requirements are therefore entitled to deference. *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845 (1984). EPA has promulgated a regulation that explains in detail the information that prospective citizen suit plaintiffs must supply in the notice letter required by 33 U.S.C. § 1365(b)(1)(A). That regulation provides that the notice letter must include, among other things, "sufficient information to permit the recipient to identify" *both* "the

specific standard, limitation, or order alleged to have been violated" and "the activity alleged to constitute a violation." 40 C.F.R. § 135.3(a).

That distinction is both intentional and important. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 697-98 & n.11 (1995) (construing terms in list so that they "retain independent meanings" in light of Court's "reluctance to treat statutory terms as surplusage"); *Freytag v. Commissioner*, 501 U.S. 868, 877 (1991) ("Our cases consistently have expressed 'a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.'") (citations omitted). Obviously, notice of the NPDES permit condition alleged to be violated is not the same thing as notice of the substantive activity alleged to violate that condition. And, just as obviously, the statutory purposes underlying the citizen suit notice provision cannot be effectuated unless the relevant administrative agencies and the prospective defendant all receive notice of both.

C. The Ninth Circuit's Holding That The Notice Given In This Case Was Sufficient Cannot Be Reconciled With The Governing Regulations, And Transforms The Citizen Suit Notice Requirements Of The Clean Water Act Into An Empty Formality

As the Ninth Circuit's discussion makes clear, however, the notice letter sent by respondents in this case was completely devoid of any information about the actual activities that respondents believed to constitute a violation of petitioner's NPDES permits. *See* Pet. App. 14a-15a; Pet. App. 28a-35a Instead, that letter simply made the conclusory allegation that "the information currently available to us indicates that Southwest Marine and the Port District have violated NPDES General Permit No. CA5000001 governing storm water discharges associated with industrial activities in California." Pet. App. 29a. The letter then stated that "[t]he General Industrial Permit

requirements with which we believe Southwest Marine and the Port District have failed to comply are set forth in Attachment 2 to this letter." *Id.* Attachment 2, in turn, is nothing more than a list of six sections of the General Industrial Permit and a nearly verbatim recitation of what they require (i.e., that petitioner "develop[] and implement[]" a storm water plan pursuant to certain guidelines). *Id.* at 32a-33a.

That notice letter may have identified "the specific standard, limitation, or order alleged to have been violated," but it did not even attempt to further identify "the activity alleged to constitute a violation." 40 C.F.R. § 135.3(a). As the district court initially seemed to understand, that patent deficiency should have been fatal to all of respondents' claims – other, perhaps, than claims alleging nothing more than petitioner's complete failure to adopt a storm water plan that facially complied with the law (in which case the activity alleged to violate the condition would be contained "within the [plans] themselves." Pet. App. 104a-105a.

To support its holding that the notice letter provided by respondents was nonetheless sufficient to support the wide-ranging allegations ultimately litigated in this case, the Ninth Circuit focused on one isolated phrase in Attachment 2 to the notice letter. One of the General Industrial Permit sections listed in that Attachment was the provision requiring "development and implementation" of a storm water plan "describing the storm water management controls appropriate for the facility (for example, storm water pollution prevention personnel, preventive maintenance, *good housekeeping*, spill prevention and response, storm water management practices, erosion and sediment controls, employee training, and inspections)." Pet. App. 32a (emphasis added). The Ninth Circuit reasoned that, because the notice letter alleged that petitioner had failed to "implement[]" a storm water plan containing a "good housekeeping" provision, the petitioners had therefore received adequate notice of any later

allegations that could plausibly be subsumed in an expansive reading of the phrase "good housekeeping." Pet. App. 15a.

The Ninth Circuit's reasoning completely nullifies the distinction, carefully expressed by EPA in the applicable and binding regulations, between notice of the permit provision alleged to be violated and notice of the actual activities alleged to constitute such a violation.[2] A careful reading of the notice letter reveals that it did not even purport to convey any information other than a list of the permit provisions allegedly violated by petitioner. The text of the letter stated that Attachment 2 is a list of the permit provisions "with which we believe Southwest Marine . . . ha[s] failed to comply." Pet. App. 29a. One of those listed provisions required petitioner to "implement[]" a plan containing a "good housekeeping" provision. *Id.* But even if that permit provision is fairly read as a roundabout way of saying that petitioner must engage in "good housekeeping," the notice letter provided no further information beyond the reference to the permit provision itself and the naked allegation that it was violated.

The Ninth Circuit also compounded its error by permitting the phrase "good housekeeping" to encompass such a broad array of allegations and evidence that the contents of the notice letter clearly did not constrain respondents' trial presentation in any way. At trial, respondents presented testimony about a hodge-podge of perceived environmental problems at petitioner's facility that ranged from the existence of contaminated sediment around an abandoned marine railway to inadequacies in

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[2] The Ninth Circuit's elaborate justification of the fact that the notice letter failed to reference the terms of petitioner's later-revised storm water plan, Pet. App. 15a, while fair, is a red herring. The point is not that the letter failed to accurately identify the plan (or permit) provisions alleged to be violated, but that it utterly failed to provide any information about the factual activities alleged to constitute such a violation.

petitioner's berms and other structural systems for containing storm water runoff. *See, e.g.*, Pet. App. 91a-98a; Plaintiffs-Appellees' Answering Brief at 15-22, *Natural Resources Defense Council v. Southwest Maine, Inc.*, 236 F.3d 985 (9th Cir. 2000) (Nos. 99-56532, 99-56545). If a notice letter generally alleging that the recipient has failed to engage in "good housekeeping" will support the range of allegations pursued by the respondents in this case at trial, then it is hard to imagine what plausible Clean Water Act allegations it would not support.

And that, of course, is precisely why the Ninth Circuit's holding in this case cannot be reconciled with this Court's decisions in *Hallstrom* and *Gwaltney*. If the citizen suit notice requirements in the Clean Water Act (and so many other federal statutes) are to play their proper and important role in the statutory structure – the role repeatedly described by this Court – then the notice letter must give EPA and the prospective defendant fair warning of what the case will be about. Otherwise, the appropriate regulatory authorities cannot "take responsibility for enforcing environmental regulations," *Hallstrom*, 493 U.S. at 29, and the prospective defendant will have no "opportunity to bring itself into complete compliance with the Act," *Gwaltney*, 484 U.S. at 60. A naked allegation that the defendant violated the terms of its governing NPDES permit provides literally no information at all. Every Clean Water Act case necessarily involves an allegation that the defendant violated the terms of its permit, yet such an allegation without more has never been deemed sufficient notice.[3]

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[3] Although there is disagreement among circuit courts as to whether a plaintiff must provide notice of *each* "activity alleged to constitute a violation" when the activities at issue are of the "same type" or "directly related" to one another, until the Ninth Circuit's decision in this case, no circuit court after *Hallstrom* has dared to eliminate the "activity alleged" requirement altogether. *Contrast Save Our Health Organization v. Recomp of Minnesota, Inc.*, 37 F.3d 1334, 1337-38 (8th

By holding that a mere generic recitation of the terms of the defendant's permit is sufficient notice, the Ninth Circuit transformed the citizen suit notice requirement into an empty formality and exposed NPDES permit holders to a potential flood of citizen suits. Any prospective citizen plaintiff can send such a letter, whether they have any factual information indicating a violation of the recipient's permits or not. After waiting sixty days, the citizen plaintiff can file a lawsuit that – if the Ninth Circuit's holding stands – will always survive a motion to dismiss. Acting as a self-appointed investigative watchdog, the citizen plaintiff may then initiate an open-ended, costly and disruptive discovery fishing expedition (including, if this case is any guide, frequent on-site inspections of the defendant's facilities). Those efforts will inevitably produce disputed factual issues, allowing the citizen plaintiff to survive summary judgment and subject the defendant to the expense of a trial. That is not the carefully circumscribed role that Congress

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Cir. 1994) (holding that district court lacked jurisdiction under Clean Air Act over three particular odor concentration violations where plaintiffs gave notice of other odor violations but failed to include allegations of these particular odor violations in notice letter*) and Atlantic States Legal Foundation, Inc. v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473, 478 (6th Cir. 1995) (holding that district court lacked jurisdiction under Emergency Planning and Community Right-to-Know Act over alleged 1991 violations where plaintiffs gave notice of alleged violations from 1987-1990 but failed to specifically mention any violation in 1991) *with Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc.*, 50 F.3d 1239, 1248-1250, 1252 (3d Cir. 1995) (holding that under the CWA, a citizen plaintiff's initial notice of discharge violations was sufficient to encompass additional *"directly related"* discharge violations of the *"same type* (same parameter, same outfall)" and *"directly related"* violations of "monitoring, reporting, and recordkeeping requirements for that same parameter at that outfall") (emphasis added*) and Atlantic States Legal Foundation, Inc. v. Stroh Die Casting Co.*, 116 F.3d 814 (7th Cir. 1997) (holding that under CWA notice letter which specifically alleged that on several occasions defendant had exceeded the daily maximum discharge limits for specific pollutants from a certain outfall was sufficient to include later discharges rerouted from that point source to a newly-created outfall).

envisioned for citizen suits under the Clean Water Act, and that this Court described in *Hallstrom* and *Gwaltney*.

D. The Ninth Circuit's Holding That A Vague Notice Letter Can Be Cured By Extrinsic Evidence Of The Defendant's Reaction Is Inconsistent With The Congressional Policies Underlying The Notice Requirement As Explained By This Court

The Ninth Circuit also held, in effect, that the content of the notice letter could be supplemented (retroactively) by reference to any later steps that petitioner took to improve its environmental compliance systems. Pet. App. 16a. The court reasoned that petitioner "obviously understood at least some of the alleged violations" because it "completely revised its [storm water plans] within four months, adding sections that specifically made reference to the requirements that Plaintiffs had identified," and because it "made substantial changes to its facility and operations during the pendency of this litigation." *Id.*

As an initial matter, the Ninth Circuit's reference to the "substantial changes to [petitioner's] facility and operations *during the pendency of this litigation*" perfectly illustrates the court's dismissive attitude toward the citizen suit notice requirement. *Id.* (emphasis added). Even if those structural and operational changes were in fact inspired or provoked by this litigation, they did not occur until after the respondents elaborated upon their "implementation" allegations in the complaint and at trial. The only changes that petitioner made between receipt of the notice letter and the filing of the complaint were to the facial terms of its storm water plans, which the district court ultimately found to be in compliance with petitioner's permits and the Clean Water Act.[4] The Ninth Circuit's reliance on changes in

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[4] Petitioner's amendment of its existing storm water plans between the notice letter and the filing of the complaint illustrates how the citizen suit process is supposed to work, and why the notice provision is

petitioner's implementation policies *after the complaint was filed* (and respondents' allegations were greatly elaborated) to show that petitioner "understood" the original notice letter to cover those matters is simply absurd, and transforms the notice letter into little more than a placeholder for the evidence eventually adduced at trial.

In any event, the Ninth Circuit's inference that any subsequent changes by petitioner must have been "in response to" the notice letter, and that they therefore demonstrate that petitioner "obviously understood at least some of the alleged violations," is flawed on many levels. Pet. App. 15a. First, NPDES permit holders like petitioner have complex environmental systems in place and are constantly reevaluating and seeking to improve them. Petitioner's efforts to comply with the San Diego RWQCB's first permit that specifically dealt with storm water discharges (adopted after the filing of this lawsuit) obviously occasioned many of the changes implicitly referenced by the Ninth Circuit. Pet. App. 50a. Second, even if receiving a notice letter does provoke the recipient to reexamine and improve its environmental practices, that certainly does not establish that any problems identified and corrected by that review were fairly identified by the notice letter itself. The Ninth Circuit's inference that all changes made after litigation has been threatened necessarily demonstrate that the defendant must have "understood" the notice letter is therefore factually implausible, even if it does not

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important. As the district court initially recognized, the *only* thing that respondents' notice letter gave petitioner fair notice of was an allegation that the facial terms of its storm water plans might not comply with the requirements of the applicable permits. *See supra* at 5. Petitioner successfully corrected that perceived defect before the initiation of this lawsuit. Had respondents provided intelligible notice about the substance of their eventual "implementation" allegations in the letter, petitioner might have been able to correct them as well and spare everyone the expense of this litigation. As this Court has recognized, that is exactly the point of the notice requirement. *Gwaltney*, 484 U.S. at 60; *Hallstrom*, 493 U.S. at 29.

technically violate the ban on evidence of subsequent remedial measures found in Rule 407 of the Federal Rules of Evidence.

More importantly, however, the Clean Water Act requires that citizen plaintiffs deliver effective notice not only to the potential defendant but also to EPA and the appropriate State regulatory authorities. Even if the defendant "understood" a vague (or, as in this case, entirely vacuous) notice letter because of extrinsic information in its possession, that private knowledge obviously cannot cure the defect in the notice given to EPA and the State. And this Court's holding in *Hallstrom* was, precisely, that a deficient notice to the regulators is fatal to any citizen suit, even if the defendant itself has been adequately notified.

Considered as a whole, the Ninth Circuit's analysis of the notice provided in this case eviscerates the citizen suit notice requirement and upsets the balance carefully struck by Congress between public and private enforcement of the Clean Water Act. The Ninth Circuit's reasoning cannot be reconciled with this Court's decisions in *Hallstrom* and *Gwaltney*, and the matter is so essential to the proper administration of the Clean Water Act that it merits review and correction by this Court.

II. THE STANDARD ADOPTED BY THE NINTH CIRCUIT FOR REVIEW OF DISTRICT COURT INJUNCTIONS IN CLEAN WATER ACT CASES IS CONTRARY TO THIS COURT'S PRECEDENTS, AND PERMITS THE FEDERAL COURTS TO USURP THE POLICYMAKING DISCRETION ENTRUSTED TO EPA BY THE CLEAN WATER ACT

A. This Court Has Held, Clearly And Repeatedly, That The Clean Water Act Vests Discretion To Strike The Appropriate Cost-Benefit Balance For Water Pollution Cases In EPA And Its Designates, Not The Federal Courts

This Court has repeatedly recognized that the Clean Water Act is a careful and comprehensive effort by Congress to balance the various interests and values associated with the regulation of industrial water pollution, and that courts cannot be permitted to interfere with that regulatory structure under the guise of common law rulemaking or the exercise of equitable discretion.

In *City of Milwaukee*, this Court held that the Clean Water Act entirely preempts the federal common law of nuisance as it relates to water pollution. This Court explained that the Act was plainly designed by Congress to be "an all-encompassing program of water pollution regulation" and stated that "Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *City of Milwaukee*, 451 U.S. at 317-18. This Court concluded that "[f]ederal courts lack authority to impose more stringent effluent limitations

under federal common law than those imposed by the agency charged by Congress with administering this comprehensive scheme." *Id.* at 320.

In *International Paper Co. v. Ouellette*, this Court held that the Clean Water Act also preempts State nuisance law to the extent that it attempts to impose liability on an out-of-state source.[5] This Court recognized that the application of "vague" and "indeterminate" nuisance law standards would "undermine the important goals of efficiency and predictability in the permit system." *Ouellette*, 479 U.S. at 496. "It would be extraordinary for Congress," this Court concluded, "after devising an elaborate permit system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure." *Id.* at 497.

At the heart of this Court's decisions in *City of Milwaukee* and *Ouellette* is a recognition that the Clean Water Act entrusts a critical balancing of costs and benefits to the discretion of EPA and designated state permitting authorities. "By establishing a permit system for effluent discharges," this Court held, "Congress implicitly has recognized that the goal of the CWA – elimination of water pollution – cannot be achieved immediately, and that it cannot be realized without incurring costs." *Ouellette*, 479 U.S. at 494. EPA and its designates "issue[] permits according to established effluent standards and water quality standards, that in turn are based upon available technology, 33 U.S.C. § 1314, and competing public and industrial uses, § 1312(a)." *Id.* And those permits will, inevitably, sometimes reflect policy choices that a particular citizen plaintiff (and even a particular federal court) might consider insufficiently protective of the environment. But

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[5] The Act contains a savings clause that permits States to impose more stringent limitations on in-state dischargers as a matter of State law. *See* 33 U.S.C. §§ 1370, 1365(e).

this Court has made it clear that, "[a]lthough a federal court may disagree with the regulatory approach taken by the agency with responsibility for issuing permits under the Act," that court may not substitute its judgment for that of the agency by fashioning a supplemental common law remedy. *City of Milwaukee*, 451 U.S. at 323.

That division of responsibility is also clearly reflected in the Clean Water Act's enforcement provisions. When a plaintiff prevails in a citizen suit to enforce compliance with an effluent standard (including a permit condition) or a governmental order with respect to such a standard, Section 505(a) of the Act authorizes a district court *"to enforce such an effluent standard or limitation, or such an order."* 33 U.S.C. § 1365(a) (emphasis added). The Act does not give the court jurisdiction to modify, rewrite, or supplement the standards and limitations promulgated by EPA and its designates; it merely grants jurisdiction to enforce them. And, unlike so many other comparable federal statutes, the Act pointedly *does not* give the district court jurisdiction to grant "other appropriate relief" or the like.[6]

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[6] There is, in fact, only one area in which this Court has allowed federal courts enforcing the Clean Water Act to exercise their traditional equitable discretion. In *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), a district court held that the U.S. Navy's use of a bombing range off the coast of Puerto Rico required an NPDES permit. The district court did not, however, enjoin the Navy from using that range until the necessary permit had been obtained. This Court held that the district court retained the equitable discretion to decline to issue an injunction, in part because the Clean Water Act provides for other "means of ensuring compliance," such as "fines and criminal penalties." *Romero-Barcelo*, 456 U.S. at 314. But allowing a federal court to abstain from using its equitable powers to enforce the NPDES permitting process when necessary to ensure military preparedness is obviously a far cry from allowing the court to issue an injunction that actively interferes with that process, as the Ninth Circuit did in this case.

B. The District Court's Injunction In This Case Essentially Rewrote Petitioner's Governing NPDES Permits And Usurped The Proper Role And Authority of the San Diego Regional Water Quality Control Board

The injunction entered by the district court in this case accomplished precisely what this Court warned against in *City of Milwaukee* and *Ouellette*: it required more stringent water pollution prevention requirements than were imposed after careful consideration by EPA's designee, the San Diego Regional Water Quality Control Board -- and thereby substituted the district court's judgment for that of the expert administrative agency charged by Congress with administering the Clean Water Act. None of the "improved practices," Pet. App. 65a, ordered by the district court have anything to do with petitioner's governing NPDES permits, and several are actively inconsistent with those permits in exactly the same way as the common law nuisance judgments invalidated by this Court in *City of Milwaukee* and *Ouellette*.

The most glaring example is the district court's requirement that petitioner adopt a storm water diversion system that captures 100% of the storm water flowing off all of petitioner's piers. *See* Pet. App. 58a, 70a. At the time the district court issued its injunction, petitioner's NPDES permit did not require it to capture *any* storm water. Trial Exhibit ("TE") 729 (ER 249); TE 945 (ER 1661). A more stringent revised permit adopted in May 1997 now requires petitioner to capture only the first quarter-inch of storm water from "high risk" areas. The San Diego RWQCB arrived at that quarter-inch requirement (and the limitation to "high risk" areas) after public hearings in which respondents participated, and a San Diego Superior Court judge later upheld it as a "reasoned compromise between the most conservative and expensive measure (one-half inch), and an inadequate measure which would allow a

greater amount of polluted runoff into the Bay (one-tenth inch)." *Id.*; *National Steel & Shipbuilding Co. v. California State Water Resources Control Bd.*, Case No. 724222 (Cal. Oct. 18, 1999). Petitioner in fact has a state-of-the-art drainage system that does capture a full half-inch of storm water runoff from "high risk" areas of its facility, including one of the piers. By requiring petitioner to capture 100% of the runoff, and to extend the system to all piers (whether they or not they are "high risk" areas), the district court did not merely substitute its opinion for the considered judgment of the agency; it imposed a requirement that the agency found to be so burdensome that it was not even within the appropriate range of consideration. *See* Pet. App. 42a-43a ("The Court acknowledges that Defendant's existing stormwater containment system exceeds current regulatory requirements.").

Other requirements imposed by the district court similarly "ratchet up" the requirements found in petitioner's NPDES permits. For example, those permits require petitioner to capture storm water from two storm events per year, and test it for significant pollutants. Clerk's Record ("CR") 23 (ER 123). The district court ordered petitioner to capture and test the runoff from *every* storm and test it before releasing it into the bay. Pet. App. 55a. The district court required petitioner to test the surrounding water column in four different locations and at multiple depth intervals whenever conducting sandblasting or painting operations on any vessel, even though such measures are not required by petitioner's permits – and self-evidently have absolutely nothing to do with storm water pollution at all. Pet. App. 56a-57a. And the court also ordered petitioner to replace all the existing asphalt berms in its facility with concrete ones, even though the use of asphalt berms is not prohibited by petitioner's permits (and petitioner's storm water diversion and capture system is, in

fact, already substantially more elaborate and effective than required by the RWQCB). Pet. App. 70a-71a.

As petitioner explained to the Ninth Circuit, the inherent inconsistency of the district court's holding further illustrates that the district court was not interpreting or "enforcing" the requirements of petitioner's existing permits but rather creating new ones out of whole cloth. The district court held that petitioner's existing storm water plans were *already* adequate to conform to the requirements of its NPDES permits. Pet. App. 65a. The district court's decision to impose additional elaborate additional requirements can therefore be understood only as a determination that the terms of petitioner's permits are not stringent enough to adequately protect the environment, in the district court's own personal judgment.

And that is precisely the import of the district court's forthright response when petitioner protested that the court's injunction was impermissibly modifying the terms of petitioner's permits:

> THE COURT: All I got from the Defendants was, number one, I don't have the power to do anything I want to do because I'm bound by the NPDES permit. And that's on appeal, and my present position is that's not the law, and I don't consider myself bound by the NPDES permit. . . . *I don't think the NPDES permit, which is the product of a state agency, is the Supreme Court of the United States on the Clean Water Act.* And this is an Article 3 court, a District Court, and I'll take my reversals from the Ninth [Circuit] and from the Supreme Court but not by the NPDES.
>
> ....

> *I don't recognize that this Court is limited by your NPDES permit. I reject that position.* I believe that this Court under the Clean Water Act has the power to order corrective action necessary to reasonably protect the environment, and that's what I've done.

Reporter's Transcript ("RT") 3/6/00 at 7-8, 66 (Appellees' Supplemental Excerpts of Record ("SER") 1319-1320, 1355) (emphasis added).

With due respect to the district court, that approach to injunctive relief under the Clean Water Act cannot be reconciled with this Court's decisions in *City of Milwaukee* and *Ouellette*.

C. The Deferential Standard Adopted By The Ninth Circuit Permits District Courts To Impose More Stringent Water Quality Standards Than EPA And Its Designees, In Direct Conflict With This Court's Decisions In *City Of Milwaukee* and *Ouellette*

The Ninth Circuit nonetheless affirmed the district court's injunction on the novel theory that federal courts could impose additional requirements or limitations on NPDES permit holders as long as those requirements were "reasonably calculated to 'remedy an established wrong'" and "consistent with, and complementary to, existing permit requirements." Pet. App. 22a-23a. (citations omitted). That standard reflects a serious misunderstanding of the statutory structure, and of this Court's decisions in *City of Milwaukee* and *Ouellette*.

The Ninth Circuit appears to have believed that the district court's additional requirements were "consistent with, and complementary to, existing permit requirements" as long as it was possible for petitioner to comply with both its existing permits and the injunction simultaneously. But this Court recognized in *City of Milwaukee* and *Ouellette* that the Clean Water Act preempts all other legal authority

(unless specifically excepted in the Act's "savings" clause) to the extent that it imposes requirements that are more stringent than, or in addition to, what the NPDES permit itself requires. The scope of that preemption rules out any possibility that a district court could "supplement" the requirements of an NPDES permit by injunction without substituting its own judgment for that of the agency.

"In imposing stricter effluent limitations," this Court wrote in *City of Milwaukee*, "the District Court was not 'filling a gap' in the regulatory scheme, it was simply providing a different regulatory scheme." 451 U.S. at 324 n.18. The same is true of the district court's injunction in this case. The district court's command that petitioner capture all of the storm water running off its piers is not "consistent with" or "complementary to" the San Diego RWQCB's requirement that it capture the top quarter inch of such storm water, for example, in any relevant sense. It is simply different, and more stringent. The Ninth Circuit's conclusion to the contrary is inconsistent with this Court's holdings in *City of Milwaukee* and *Ouellette* that the Clean Water Act and the NPDES permitting process occupy the entire field.

In an ironic twist, the Ninth Circuit's holding in this case actually appears to be that, although the Clean Water Act protects the expert judgment of EPA from interference by judges seeking to impose more stringent requirements under other state or federal law, it somehow permits such interference by judges purporting to enforce the Clean Water Act itself. That cannot be, and is not, the law.

D. The District Court's Civil Penalty Award Should Be Vacated Along With The Injunction

In addition to the injunction described above, the district court imposed a civil penalty on petitioner in the amount of $799,000. The district court based that calculation on a judgment that petitioner should pay $1000 of penalties per day that it was violating its permits, and the conclusion

that petitioner had failed to implement its permit requirements adequately for 799 consecutive days, from the date plaintiffs filed their lawsuit (August 27, 1996) until the day before trial (November 3, 1998). Pet. App. 73a.

As petitioner explained to the Ninth Circuit, that conclusion lacks any evidentiary foundation in the record, and is clearly erroneous. The district court explicitly held that petitioner's storm water plans are themselves adequate to satisfy the requirements of petitioner's permits. Pet. App. 65a. And respondents did not even introduce evidence of "implementation" violations occurring on each of the 799 days between the date the respondents filed their lawsuit and the beginning of trial. Even if every implementation defect alleged by respondents is credited, they would still not add up to any number approaching 799 independent days of violation.

Furthermore, the civil penalty statute requires the district court to consider "the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." 33 U.S.C. § 1319(d). But, as the district court itself conceded, whatever post-complaint violations the court found to exist are not severe. Pet. App. 72a. The district court's opinion also repeatedly acknowledged petitioner's good-faith efforts to comply with its permit obligations. Pet. App. 65a, 72a. Especially when compared to the amount of civil penalties awarded in other cases, the district court's imposition of a $799,000 amount is an excessive and unjustified abuse of discretion. Indeed, petitioner is unaware of a single case in which civil penalties were imposed in the absence of multiple, documented violations of numeric effluent standards – a showing that respondents utterly failed to make.

The Ninth Circuit held that petitioner's challenges to the penalty calculation were essentially moot, because the district court allowed petitioner to set off the penalty against the multi-million dollar cost of complying with its injunction. Pet. App. 26a. "Accordingly, anticipated alterations, when offset against the $799,000 civil penalty, will reduce the penalty to zero." *Id.* Because the injunction exceeded the district court's authority, however, the offset relied upon by the Ninth Circuit is illusory. Petitioner respectfully submits that this Court should, after vacating that injunction, therefore set aside the district court's penalty award as well – or, at a minimum, vacate and remand it for reconsideration in light of this Court's opinion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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